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16 DANIEL MARIA CUI

17
18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 THE O.N. EQUITY SALES COMPANY,
21 an Ohio Corporation,

22 Plaintiff,

23 vs.

24 DANIEL MARIA CUI, an individual,

25 Defendant.
26
27
28

Civil Action No. C-07-2844 JL

E-FILING

**JOINT CASE MANAGEMENT
STATEMENT**

DATE: September 7, 2007
TIME: 1:30 p.m.
CTRM: 2, 17th Floor

Complaint filed: May 31, 2007
Trial date: None

1 1. Jurisdiction and Service. This Court has jurisdiction over this dispute pursuant
2 to 28 U.S.C. § 1332, as the matter in controversy exceeds the value of \$75,000, exclusive of
3 interest and costs, and is between citizens of different states. Personal jurisdiction exists and
4 venue is also conferred under 28 U.S.C. § 1391(a) inasmuch as Defendant resides in this judicial
5 district. Defendant has been properly served in this case.
6

7 2. Facts.

8 Plaintiff's Position: Plaintiff The O.N. Equity Sales Company ("ONESCO") filed this
9 case seeking injunctive relief and a declaration that it has no obligation to arbitrate, before the
10 National Association of Securities Dealers ("NASD"), the claims asserted by Defendant Daniel
11 Maria Cui with respect to his investment in the Lancorp Financial Fund Business Trust ("Lancorp
12 Fund"). Specifically, ONESCO contends that Defendant's claims are not arbitrable because the
13 events giving rise his NASD claims (i.e., alleged misrepresentations or omissions that induced his
14 decision to invest in the Lancorp Fund) occurred before Gary Lancaster, Trustee of the Lancorp
15 Fund, became an "associated person" of ONESCO.

16 Lancaster served as a registered representative with ONESCO, on an independent
17 contractor basis, only from March 23, 2004 to January 3, 2005. Defendant executed an
18 irrevocable subscription agreement (i.e., an irrevocable commitment to purchase) with the
19 Lancorp Fund on or about July 30, 2003, over 8 months before Lancaster became affiliated with
20 ONESCO. Any misrepresentations or omissions that induced Defendant's irrevocable
21 commitment to purchase must have occurred before July 30, 2003, well before Lancaster's
22 affiliation. Defendant, however, disputes the operative dates of events giving rise to his claims.
23 Thus, ONESCO submits that the principal factual issue in dispute is whether the events giving
24 rise to Defendant's NASD claims occurred before or during Lancaster's association with
25 ONESCO. ONESCO respectfully submits that Judge Walter in the *Steinke* case cited by
26 Defendant below relied on case law where there was no dispute as to the timing of relevant events
27 for purposes of determining an investor's "customer" status under NASD rules. Defendant has
28

1 created a dispute as to the timing issue in the case, thus discovery is necessary on this issue.

2 Defendant's Position: Defendant states that the Lancorp investments at issue in the
 3 NASD arbitration case involve recommendations and purchases after Lancaster began working
 4 for ONESCO. Defendant had in 2003 signed paperwork and sent Lancaster checks totaling
 5 \$32,000 to be invested in Lancorp. These funds would be held in escrow until Lancorp became
 6 operational and the investment closed. In April 2004, after Lancaster started working for
 7 ONESCO, Lancaster changed the terms and structure of the Lancorp investment and told the
 8 Defendant that he needed to agree to the investment as changed or Lancaster would refund his
 9 funds. Defendant acknowledged the changes, and the investment closed in May 2004. In a
 10 companion case involving identical facts, *ONESCO v. Steinke*, 2007 WL 2421761 (C.D. Cal.
 11 Aug. 27, 2007), U.S. District Court Judge John F. Walter in Los Angeles recently ruled that the
 12 Lancorp investment was sold at that time in May 2004, while Lancaster worked for ONESCO.
 13 Thereafter, Defendant invested additional funds in Lancorp. Defendant alleges in his arbitration
 14 claim that ONESCO failed to supervise or is responsible for these events that occurred after
 15 Lancaster began working for ONESCO. He therefore contends that his claims are arbitrable
 16 under NASD rules.

17 3. Legal Issues.

18 Plaintiff's Position: The sole legal question presented in this case is whether Defendant's
 19 NASD claims against ONESCO are arbitrable under Rule 10301(a) of the NASD Code of
 20 Arbitration Procedure. ONESCO submits that such claims are not arbitrable in light of case law
 21 holding that arbitrability of claims asserted by a purported "customer" hinges on the timing of
 22 events giving rise to the "customer's" NASD claims. Such case law, including *Wheat, First*
 23 *Securities, Inc. v. Green*, 993 F.2d 814 (11th Cir. 1993), holds that an investor is not entitled to
 24 arbitrate his claims against a broker-dealer where such claims are premised on the investor's
 25 dealings with a representative who was not associated with said broker-dealer at the time of the
 26 events giving rise to the investor's claims. This legal proposition has been adopted by every court
 27 (other than Judge Walter's decision in the *Steinke* case) that has considered this issue, including
 28 the Southern District of California in *Prudential Sec., Inc. v. Dusch*, 1994 WL 374425 (S.D. Cal.,

Mar. 28, 1994). *See also* *Hornor, Townsend & Kent, Inc. v. Hamilton*, 2004 WL 2284503 (N.D. Ga., Sept. 30, 2004); *Gruntal & Co., Inc. v. Steinberg*, 854 F. Supp. 324 (D.N.J. 1994), *Gruntal & Co., Inc. v. Steinberg*, 854 F. Supp. 324 (D.N.J. 1994); *World Group Sec. v. Ko*, 2004 1811145, at *6 (N.D. Cal., Feb. 11, 2004); *Sands Bros. & Co., Ltd. v. Ettinger*, 2004 WL 541846 (S.D.N.Y., Mar. 19, 2004); *Ryan, Beck & Co. v. Fakih*, 268 F. Supp. 2d 210 (E.D.N.Y. 2003).

Defendant's Position: Defendant states that his investment was not sold until after Lancaster started working for ONESCO and that ONESCO is liable as a result of events, including negligent supervision of both Lancaster and the investment transactions, occurring while Lancaster started working for ONESCO. Judge Walter in *ONESCO v. Steinke*, 2007 WL 2421761 (C.D. Cal. Aug. 27, 2007), recently agreed with other Lancorp investors in identical circumstances that their claims are arbitrable on this basis, and this Court should reach the same conclusion. Unlike the present case, the cases cited by ONESCO generally do not involve investments sold while the broker worked for the firm; to the extent these cases do involve such investments, these cases found that the disputes were arbitrable.

4. Motions: ONESCO anticipates that it will file a motion for preliminary injunction, and has filed a motion to consolidate the hearing on its motion for preliminary injunction with trial on the merits, and a motion for an order authorizing the parties to engage in immediate discovery.

Defendant anticipates that he will file a motion to compel arbitration and motion for protective order.

5. Amendment of Pleadings: The parties do not anticipate a need to amend the pleadings in this case.

6. Evidence Preservation: The parties do not anticipate any need for special evidence preservation measures in this case.

7. Disclosures: The parties will make their initial disclosures pursuant to Rule 26(a)(1).

8. Discovery: The parties have engaged in no discovery, to date.

1 A. Plaintiff's Position On The Necessity Of Discovery: Discovery is
 2 necessary, and should be focused upon the issue of whether Defendant's claims are subject to
 3 arbitration. If discovery is conducted in an orderly fashion, it should be completed within 4-6
 4 weeks.

5 Plaintiff will file a Motion for Preliminary Injunction. This motion will ask, succinctly,
 6 whether Defendant's claims are arbitrable. Accordingly, discovery on the issue of arbitrability is
 7 relevant and proper in this case.

8 "[I]n a Title 9 action to compel arbitration, the discovery provisions
 9 of the Federal Rules are applicable. Rule 26 allows discovery only
 10 of matters relevant to the controversy, and in a Title 9 action, the
issue of arbitrability is a relevant and proper matter for discovery."

11 [Moore's Federal Practice (2d ed.) § 81.05[7] (emphasis added).]

12 It is hornbook law that discovery relevant to the issue of arbitrability is proper with
 13 respect to a party's motion to compel arbitration—an action expressly governed by the Federal
 14 Arbitration Act. It follows that discovery on the issue of arbitrability is equally, if not more,
 15 appropriate in a preliminary injunction action, which is governed by Rule 65 of the Federal Rules
 16 of Civil Procedure.

17 Because the question of arbitrability often hinges on the resolution of factual disputes,
 18 courts routinely permit parties to conduct discovery on that issue, whether the action is brought
 19 pursuant to the Arbitration Act or the federal rules. *See Investor's Capital Corp. v. Brown*, 129 F.
 20 Supp.2d 1340, 1341 (M.D. Fla. 2000) ("this Court ... concludes that the Plaintiff is entitled to
 21 limited discovery on the 'customer' issue" for purposes of determining arbitrability under NASD
 22 rules) (emphasis added); *International Union of Electrical Radio & Machine Workers, AFL-CIO*
 23 *v. Westinghouse Electric Corp.*, 48 F.R.D. 298, 300-01 (S.D.N.Y. 1969) (noticed depositions
 24 relating to issue of arbitrability must proceed).

25 Here, discovery is both relevant and proper on the critical factual issues relevant to the
 26 question of arbitrability. Such issues include the occurrence and timing of events giving rise to
 27 the Defendant's NASD claims, and the factual import of representations, which were made before
 28 Lancaster's affiliation with ONESCO. Discovery also is relevant and proper as to the content and

1 alleged materiality of any representations made after Lancaster became affiliated with
 2 ONESCO—i.e., whether subsequent representations (if any) were new and/or materially different
 3 from those made prior to such affiliation. Resolution of these factual issues is critical to
 4 Plaintiff's case and this Court's ultimate determination on the issue of arbitrability.

5 B. Plaintiff's Position On Discovery Limitations: Discovery should be
 6 limited to the issue of whether Defendant's claims are subject to arbitration. ONESCO will agree
 7 to cooperate with Defendant in conducting discovery so as to minimize expense. Because the
 8 sole issue is whether Defendant's claims are arbitrable, discovery will be quite limited. Once
 9 Defendant produces discoverable documents, ONESCO intends to take the deposition of
 10 Defendant and one nonparty witness (Gary Lancaster).

11 C. Defendant's Position on Discovery: Defendant disagrees that any
 12 discovery should occur and will file a motion for protective order and motion to compel
 13 arbitration. This Court should defer its decision whether to allow discovery until the motion for
 14 protective order, motion to compel arbitration, and ONESCO's motion for preliminary injunction
 15 are decided. That is the precise procedure implemented by the federal district court in Los
 16 Angeles when confronted with the same discovery issue in *ONESCO v. Steinke*, C.D. Cal. Case
 17 No. CV07-3170, namely: no discovery allowed until resolution of both the investors' motion to
 18 compel arbitration and ONESCO's motion for preliminary injunction. The court then compelled
 19 arbitration without allowing discovery.

20 Costly and time-consuming discovery in court defeats the purpose of arbitration to
 21 provide a speedy and inexpensive alternative to litigation. It violates the command of the Federal
 22 Arbitration Act ("FAA") and the Supreme Court "to move the parties to an arbitrable dispute out
 23 of court and into arbitration as quickly and easily as possible." *Moses H. Cone Memorial Hosp.*
 24 *v. Mercury Const. Corp.*, 460 U.S. 1, 22 (1983). ONESCO is using this court action to obtain
 25 discovery, such as depositions, that it could not obtain in arbitration. Depositions are generally
 26 not permitted in arbitration.

27 ONESCO will seek to depose the Defendant about the merits of his claims, under the
 28 guise of obtaining information about arbitrability. ONESCO openly admits in this Scheduling

1 Report that it wants to ask what representations were made to the Defendant and when these
 2 representations were made. The content and nature of the seller's misrepresentations, however,
 3 are issues fundamental to liability in every securities fraud case. Accordingly, ONESCO's
 4 requested discovery improperly relates to the merits, not to arbitrability. This Court is not
 5 permitted to decide the merits of the Defendant's claims.

6 What counts for arbitrability purposes is that the Defendant will establish, with
 7 incontrovertible supporting documentation, that events occurred while Lancaster worked for
 8 ONESCO for which ONESCO can be held liable. This Court has facts before it which are
 9 sufficient for it to compel arbitration, without delay for costly discovery. If ONESCO is permitted
 10 to take depositions, then the Defendant must also be permitted to take depositions of the
 11 Plaintiff's personnel, and the result will be a vast expansion of the time and effort needed to
 12 resolve the narrow arbitrability issue in this case.

13 The proper procedure is to determine whether the arbitrability issues can be resolved first,
 14 before permitting time-consuming discovery. *See Washington Square Sec., Inc. v. Aune*, 253 F.
 15 Supp. 2d 839, 845 (W.D.N.C. 2003), *aff'd*, 385 F.3d 432 (4th Cir. 2004) ("[T]here is no need to
 16 conduct any discovery, albeit limited, where it is clear that the instant dispute is, in fact,
 17 arbitrable" under NASD rules.); *Investors Capital Corp. v. Rimmner*, 2001 WL 114936, at *2
 18 (M.D. Fla. Feb. 5, 2001) ("[The brokerage firm's] request to conduct limited discovery on the
 19 issue of arbitrability [under NASD rules] is DENIED."); *ACE Ltd. v. CIGNA Corp.*, 2001 WL
 20 767015, at *5 n.2 (S.D.N.Y. July 6, 2001) ("[S]uch discovery proceedings are more appropriate
 21 for evaluating the merits of the dispute (which is the arbitrator's task) than for determining the
 22 arbitrability of the issue (which is our only task here).").

23 9. Class Actions: N/A

24 10. Related Actions: N/A

25 11. Relief: ONESCO seeks injunctive relief enjoining Defendant from proceeding
 26 with his NASD arbitration action and declaratory relief that ONESCO has no obligation to
 27 arbitrate Defendant's claims. Defendant seeks an order compelling ONESCO to arbitrate his
 28 claims. No damages are requested in this case.

1 12. Settlement and ADR: Because the sole issue in this case is whether Defendant's
2 claims are arbitrable and neither party is seeking monetary relief, the parties agree there is little
3 likelihood of settlement, and there should be no ADR in this matter (subject, of course, to
4 Defendant's contention that his underlying claims are arbitrable under the rules of the National
5 Association of Securities Dealers, Inc. ("NASD")).

6 13. Consent to Magistrate Judge For All Purposes: The parties have not agreed to
7 refer the case to the assigned Magistrate Judge.

8 14. Other References: Subject, again, to Defendant's contention that his underlying
9 claims are arbitrable under the rules of the NASD, the parties agree that this case is not suitable
10 for reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict
11 Litigation.

12 15. Narrowing of Issues: This case presents only one issue: The arbitrability of
13 Defendant's claims. As such, ONESCO submits that expedited discovery, and an order
14 consolidating the hearing on ONESCO's motion for preliminary injunction with trial on the
15 merits is appropriate (and would promote judicial efficiency) in this case. Defendant believes this
16 Court should follow Judge Walter's procedure in *ONESCO v. Steinke*, 2007 WL 2421761 (C.D.
17 Cal. Aug. 27, 2007), and determine first whether it can resolve the Defendant's Motion to Compel
18 Arbitration and ONESCO's Motion for Preliminary Injunction, before it considers whether to
19 allow discovery or a trial on the merits.

20 16. Expedited Schedule: ONESCO believes that expedited discovery, including
21 limited depositions, can be completed in four to six weeks, and that a consolidated hearing on
22 ONESCO's motion for preliminary injunction and trial on the merits can be conducted within six
23 to eight weeks. Defendant believes that this Court has already directed the parties to agree on a
24 briefing schedule for their motion to compel arbitration and motion for preliminary injunction.
25 As in *ONESCO v. Steinke*, 2007 WL 2421761 (C.D. Cal. Aug. 27, 2007), the parties should
26 notice these motions for the same day, and the Court can then expeditiously resolve these
27 motions, which are likely to be dispositive.

28

17. Scheduling

Plaintiff's position: Plaintiff has filed a Motion to consolidate the hearing on its anticipated motion for preliminary injunction with the trial on the merits. Given the limited nature of the issue presented, as well as the limited discovery required, this case should be ready for trial sometime in November 2007. Defendant, on the other hand, proposes the trial in July, 2008. In all likelihood that will be too late – the arbitration hearing for defendants' claims will most likely be scheduled sometime in the Spring of 2008. Accordingly, the hearing on ONESCO's motion for injunctive relief must occur sooner than July 2008.

Defendant's counsel argues that his obligations in other federal court actions filed by ONESCO would prevent him from preparing for a hearing before July 2008. Of course, counsel's workload does not excuse his obligation to timely comply with deadlines. Indeed, this basic proposition is well settled. *See, e.g., Gwaduri v. I.N.S.*, 362 F.3d 1144, 1146 (9th Cir. 2004); *Maryland Casualty Co. v. Connor*, 382 F.2d 13, 16-17 (10th Cir. 1967); *Pinero Schroeder v. Federal National Mortgage Association*, 574 F.2d 1117, 1118 (1st Cir. 1978) *Andrews v. Time, Inc.*, 690 F. Supp. 362, 365 (E.D. Pa. 1988). But, in any event, if Defendant's counsel truly believes his workload is too burdensome, he has no one but himself to blame.

Over the past five months, Defendant's counsel has chosen, apparently after various solicitation efforts, to initiate 15 different actions against ONESCO, involving at least 55 different Claimants, with the NASD. As part of these 15 actions, Defendant's counsel has filed no less than 25 pleadings or amended pleadings—each approximately 50 pages in length. The Claimants in these NASD actions hail from 17 different states (and, in one instance, a different country). Interestingly, in filing these actions, Defendant's counsel has chosen to join Claimants from geographically distant states in the same actions, while at the same time including Claimants from the same state in different actions. Many of these Claimants (like Plaintiff here) signed Subscription Agreements to invest in the Lancorp Fund long before Gary Lancaster became an "associated person" of ONESCO.

As a result of these filings, and in an effort to vindicate its settled right to avoid arbitrating claims it has not agreed to arbitrate, ONESCO has initiated a number of federal court actions

1 against various Claimants in the NASD actions. Given the inexplicable alignment of Claimants
2 selected by Defendant's counsel, the vast geographic diversity of their respective residences, and
3 the substantially different facts (and state laws) involved in each Claimant's purported claims
4 against UNESCO, UNESCO has been forced to bring these actions concurrently in multiple
5 districts. Defendant's counsel has elected to represent the defendants in each of these federal
6 court actions.

7 In short, Defendant's counsel was not too busy to contemporaneously initiate numerous
8 arbitration actions against UNESCO in numerous locations, in his preferred forum, albeit the
9 incorrect forum. But, now that UNESCO has chosen to protect its rights in federal court,
10 Defendant's counsel is suddenly too busy to timely comply with Defendant's discovery
11 obligations. There is no special exception from such obligations for attorneys who would prefer
12 to be in a different forum.

13 Defendant's Position: UNESCO has filed 20 court actions around the country--in the
14 District of Arizona, Southern, Central, and Northern Districts of California, the District of
15 Colorado, the Middle and Northern Districts of Florida, the Northern District of Iowa, the Eastern
16 District of Michigan, the District of Minnesota, the District of New Jersey, the Eastern District of
17 Pennsylvania, the Southern District of Texas, the District of Vermont, the Eastern District of
18 Virginia, the Western District of Washington, and the Western District of West Virginia--to
19 enjoin investors' arbitrations relating to Lancorp, and more court actions will likely be filed.
20 Defendant's counsel has made various proposals to UNESCO to lessen expense and to simplify
21 matters by accepting service, consolidating cases, and staying some of the cases and the
22 underlying arbitrations. UNESCO has repeatedly rejected all such proposals.

23 Although Defendant's counsel has filed several arbitrations, almost all of these
24 arbitrations include multiple claimants. Many of UNESCO's separately filed court actions
25 involve investors in the same arbitration. UNESCO could easily have joined these cases together.
26 In addition, the arbitrations do not involve depositions and court appearances around the country,
27 unlike UNESCO's court actions, for which UNESCO is seeking to take depositions and most of
28 which involve single individuals or married couples.

1 As a result solely of ONESCO's filing of 20 federal court actions around the country, with
2 more actions coming, Defendant's counsel has dozens of federal court events in ONESCO cases
3 scheduled in the next few months. Several of these events involve in-person appearances in
4 federal courts around the country. This list includes only events that are presently scheduled in
5 ONESCO court cases. It does not include motions, responses, replies, depositions, discovery,
6 hearings, and trials that will be filed or ordered or become necessary in these cases. It does not
7 include any events in the underlying ONESCO arbitrations. It does not include any events for the
8 other cases in counsel's caseload.

9 In view of Defendant's counsel's already heavy ONESCO caseload, which will become
10 even heavier, trial cannot be completed by ONESCO's proposed deadline in November 2007. If
11 this Court orders discovery in this case over Defendant's objection, this Court should at the
12 earliest direct the completion of discovery by March 15, 2008. Defendant may need more time,
13 depending in part on what is ordered by the other federal courts. Given the 20 federal ONESCO
14 actions around the country, if this Court conducts a full trial, Defendant does not expect to be
15 ready for trial until, at the earliest, July 15, 2008. This trial date may in fact need to be later,
16 depending in part on what is ordered by the other federal courts. With respect to ONESCO's
17 assertion that the arbitration will likely be scheduled in the spring of 2008, this Court can decide
18 when it decides the motion to compel arbitration and motion for preliminary injunction whether
19 to stay the arbitration.

20 18. Trial: Neither party has asserted a jury demand in this case. Plaintiff believes the
21 expected length of trial is 1 day. Defendant believes that, if this Court requires a full trial on
22 arbitrability over Defendant's objection, this Court should reserve 2 days for trial.

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1 19. Disclosure of Non-party Interested Entities or Persons: Each party has filed the
2 “Certification of Interested Entities or Persons” required by Local Rule 3-16.

3
4 Respectfully submitted on behalf and with the
 approval of all parties,

5 Dated: August 31, 2007 ZEIGER, TIGGES & LITTLE LLP

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7 By: _____/s/_____
8 Michael R. Reed

9 Attorneys for Plaintiff
10 THE O.N. EQUITY SALES COMPANY
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